The United States Law School Accreditation Model: A Mixed Model

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If one were starting with a clean slate to devise a model for the accreditation of law schools, several models would leap to mind as reasonable starting points. The responsibility for accreditation could rest with the government, the education community, a separate non-profit entity, the profession, the judiciary, or some combination thereof. For the purpose of this paper we will assume that regulation is a set of rules created to provide protection for the public and for consumers of legal education. Accreditation will be assumed to be a set of standards to measure the quality of individual schools. While the activities and qualities of a school might be factors for both regulation and accreditation, and accreditation may serve some of the same functions as regulation, regulation and accreditation are not concentric circles. A law school may be in compliance with regulations and not be accredited, or it may be accredited and not in compliance with regulations. This brief paper will examine only accreditation, and only accreditation as it operates in the United States for legal education.

The primary purpose of accreditation in the United States is to define a base level of excellence in legal education. Its primary use is to provide guidance to the officials who determine eligibility to practice law. The Section on Legal Education and Admissions to the Bar of the American Bar Association has been granted authority by the United States Department of Education to accredit law schools. The Council of the Section is the decision-making entity of the Section. Accreditation authority was first granted to the Council by the Department of Education in 1952. Throughout this paper, and in general usage in the United States, there is reference to "ABA" accreditation, but it is the Council, not the ABA generally, that has the formal decision-making power.

The decision to grant accreditation has no inherent force nor does the Council's power extend beyond the decision to grant accreditation or not. The power of accreditation is created by the recognition of the accreditation decisions by the bar authorities of the various states. In the United States admission to the bar is determined state by state. There is no national bar admission granting authority. The bar admission rules in many states are similar, there are various reciprocity agreements, and there is a certain degree of standardization of bar admission tests, but the final bar admission decisions rest with each state. Typically there is a state administrative office that handles bar admission matters, usually with the guidance of a board of practicing attorneys and judges operating under the ultimate authority of the state supreme court.

The Council is supported in its accreditation work by an Accreditation Committee that conducts the preliminary accreditation review and makes recommendations, a Standards Review Committee that conducts ongoing review of the accreditation standards, and the Office of the Consultant on Legal Education that provides primary operational support. Collectively the work is referred to as the "accreditation project." The review of law schools newly seeking accreditation or of the continuation of accredited schools occurs in three stages. First, the office

of the consultant organizes site review teams to evaluate schools to be reviewed and provides training and guidance for the teams. The teams consist typically of seven members with experience and expertise in legal education and the legal profession. The standard team membership includes a chairperson, who is experienced in the site evaluation process, a librarian, a general faculty member, a clinical faculty member, a practicing lawyer or judge, a representative from the Association of American Law Schools (AALS conducts its separate membership review process concurrently with the reaccreditation process), and a university administrator if the school is part of a university. In advance of the team visit the school being evaluated provides comprehensive material for the team to review in preparation for the visit. The visit itself last three and a half days during which the team talks widely with members of the law school community to gather information to supplement the previously received information and to conduct a first hand assessment. After the visit the team produces a comprehensive fact-finding report. The team is instructed that its report is limited to fact-finding and should not express conclusions regarding whether accreditation standards have been met. Next, that report is sent to the Accreditation Committee, which reviews it in detail. At the conclusion of the review the Committee makes a recommendation to the Council regarding accreditation. In the last step the Council reviews the recommendation and makes a final decision.

The dominant rule for the vast majority of states is that an individual has to be a graduate of an accredited law school to be eligible to take the bar examination. Passing the exam is a qualification for bar admission, but the lack of a degree from an accredited law school may be an insurmountable obstacle to being allowed to take the exam. The accreditation that is typically required is accreditation by the American Bar Association. Some states have a separate process for accreditation of law schools in their state, not accredited by the ABA, but the state accreditation route is almost never available in states other than the state in which the law school is located and accredited.

ABA accreditation provides a way for state bar officials to have a level of confidence that the applicant has an educational background that would prepare her or him to be a competent practitioner. No state has taken the position that passing the bar examination alone is sufficient to ensure professional competency. Though one speaks of ABA accreditation, the process of determining accreditation and the reliance placed upon it is a complicated, mixed model involving in difference roles many entities. Although the ABA has been the authorized central accrediting role for many years and in the eyes of most has played its role with distinction, there are numerous critics who raise serious questions about both the structure of the accreditation process and how it has been carried out by the ABA.

A longstanding issue has been the question of the appropriateness of the largest lawyer professional association being charged with the accreditation function. Clearly, given the entry barrier created by the absence of a degree from an accredited law school, the power to accredit is the power to limit the number of lawyers. Some have worried that there is a great temptation to protect practicing lawyers from new competitors by limiting the number of accredited law schools. In response to these concerns the ABA points to the requirement imposed by the Department of Education in granting accreditation authority to the ABA that it must keep the accreditation function “separate and independent” for the rest of the ABA’s activities. Some have suggested that that is like giving the wolf responsibility to guard the chickens based on wolf’s promise not to harm them.

Several years ago the United States Department of Justice brought action against the ABA, charging that the ABA through its accreditation authority was engaged in anti-competitive behavior in violation of United States antitrust law. The resulting consent decree placed a number of conditions on the ABA continuing administration of accreditation. A number of years later the ABA was fined by the Justice Department for failing to meet some of those conditions.

Every five years the ABA must seek renewal of its accrediting authority from the Department of Education. During the George W. Bush administration, when the ABA sought renewal of its authority, there was intense criticism by the Department of the accreditation standard requiring law schools to seek to have racially diverse faculty and students. It was suggested that the standard created an illegal "reverse discrimination." There were extended discussions, burdensome requirements placed on the ABA to justify the standard and its use, and delay in renewal of the accreditation authority. The ABA never lost its authority and with the transition to a new administration the debate subsided, but this dispute is an example of another complaint against the ABA – that the standards advance a single model of quality education to the exclusion of alternative valid model. These criticisms take several forms: that the ABA has a social agenda unrelated to quality, that the ABA model results in unnecessarily high cost, and that the standards protect the status of faculty unrelated to quality. Interestingly on each of these issues there are individuals and organizations attacking the ABA from both sides arguing that the standards are either unnecessarily restrictive or insufficiently restrictive.

The accreditation authority from the Department of Education requires the ABA to conduct a comprehensive review of its standard every five years. The ABA is currently engaged in that review process. Observers agree that this round of review is substantially more comprehensive than prior rounds, and it is creating a firestorm of protest in Unites States law schools. In response to growing concerns about the cost of legal education, the Standards Review Committee has looked at the standards with an eye to cost implications – asking what parts of the standards impose financial burden for programmatic elements that might be good to do, but are not essential for a quality program. The review that is causing the greatest negative response regards tenure.

The accreditation standards do not explicitly require tenure. The standards do require that a law school provide security of position sufficient to attract and retain a quality faculty and have protections for academic freedom. Historically in the operation of accreditation, those requirements have been understood to require tenure for regular full-time faculty. There are separate requirements regarding security of position for the dean of the law school and for the director of the law library. There are less stringent and less clear requirements regarding clinical faculty and legal writing instructors. Over the years interest groups supporting clinicians and writing instructors have pressed for the same protection that is received by regular faculty members.

The Standards Review committee is currently attempting to define a clear and consistent standard regarding security of position and academic freedom. The fact that they are considering making changes to the standards has invoked intense criticism and opposition. In some instances there have been positions taken to oppose the Committee's recommendations before they have been drafted, seemingly based on the conviction that any change from the current language would be a change that would provide less protection for faculty. This paper

does not attempt to take a position or even to describe the positions of the various advocates, but notes only the undeniably inflammatory nature of the debate.

An issue currently before the Counsel of particular interest to the international community is whether the Counsel will allow law schools outside of the United States to apply for accreditation. There is no language in the accreditation standards restricting accreditation to United States law schools, but to date no foreign law school has applied. The question became real when the Peking University School of Transnational Law (STL) in Shenzhen China expressed its interest in being reviewed for accreditation. [Please note that the author of this paper currently serves as Associate Dean at STL.] At the time the school began operation in 2008, it announced its intention to apply for accreditation. In March 2009 at the first opportunity under the accreditation procedural rules, the law school formally submitted a notice of its request to be reviewed during the 2009-10 academic year.

In response to the impending interest by a foreign law school in applying for accreditation and other international issues confronting the Section or anticipated in the future, the Council appointed a special committee (hereinafter "Committee") to examine various international questions and issues. In the summer of 2009 the Committee issued a comprehensive report and recommendations. Regarding the question of foreign law schools applying for accreditation, the Committee took the position that the current rules permitted such an application and that there were no reasons to restrict applications from foreign law schools that could meet the accreditation standards.

The Council next appointed a second committee (hereinafter "Special Committee") to make recommendations to the Council regarding implementation of allowing foreign law schools to apply. The Special Committee issued its report in summer 2010. The report affirmed the conclusions of the Committee and made several recommendations regarding the assessment of foreign law schools: 1) the standards must be applied in the same way that they would be applied to a law school located in the United States, 2) the program must be primarily focused on United States law, 3) the program of instruction must be in English, and 4) the faculty must be predominantly J.D. graduates of accredited United States law schools.

Upon receiving the report of the Special Committee at its August 2010 meeting, the Council opted to have an extended period of public comment prior to making a decision. Fewer than a hundred comments were submitted, but they represented a broad array of viewpoints. Some from practicing attorneys strongly opposed permitting foreign law schools to seek accreditation, bluntly demanding that the ABA protect American lawyers from foreign competition. Other anti-competitive statement came from United States law school worried about competition for students from foreign law schools. Some questioned the quality of legal education conducted outside of the United States though a large portion of United States law faculty from United States law schools, who had been visiting faculty at the law school in China, testified to the quality and comparability of the program and the excellence of the students. Some comments urged further review and deliberation.

At its December 2010 meeting the Council expressed it desire to hear more from "stakeholders" – in particular state bar officials and state supreme courts – before making a decision. To date there has not been a decision nor has there been an announcement regarding a procedure for gathering more information.

Regardless of one's views on the merits of the question of permitting foreign law schools applying for accreditation, one cannot escape the troubling fact – in the public record – that many put pressure on the Council to deny access based on considerations explicitly prohibited by the conditions of Department of Education granting of accreditation authority or by the Justice Department's antitrust restrictions. One might argue that this episode reveals the inherent flaw in a mixed model for accreditation in which the leading professional organization is given a responsibility, which may be in direct conflict with the economic interests of its membership.